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IN THE

Supreme Court of the United States of America

October Term [redacted] 1962

No. 221

VIRGINIA MILANOVICH
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

There was no report of the trial court's decision. The opinion of the trial court on defendant's Motion For New Trial is appended.

The decision of the Court of Appeals for the Fourth Circuit has not been reported to date. Appended here to is the copy of the decision of said Court filed April 30, 1962, a copy of the Order amending said decision, filed June 4, 1962, and a copy of the decision as amended.

GROUNDS OF JURISDICTION

The statutory provision conferring jurisdiction in this Court to review the judgment in question is 28 U.S.C.A., Section 1254. The date of the judgment sought to be reviewed is April 30, 1962 as amended by Order entered June 4, 1962.

By Order entered May 24, 1962, this Court granted an extension of time for a period of 30 days from May 30, 1962 within which to petition for Certiorari.

QUESTIONS PRESENTED

I. Is the action of the special prosecutor in being the source of information for news broadcasts made on the eve of trial, which broadcasts refer to prior criminal activities of the accused, such a breach of the proper standards for the enforcement of criminal law in the Federal Courts as to require granting a new trial where it is shown that the jurors did not hear such broadcast?

II. Is it error for the Circuit Court of Appeals to amend its decision in a criminal matter on the basis of unsworn statements made by the prosecutor at an ex parte hearing at which the accused is not present, such hearing being held after the rendering of its decision by such Circuit Court of Appeals?

III. Is a wife's right of privacy under the Fourth Amendment violated by a general search of her personal belongings during a search made pursuant to a consent to search given by the husband at the time of this arrest?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In the July, 1958 term of the United States District Court for the Eastern District of Virginia, Norfolk Division, the Grand Jury indicted the accused, Virginia Milanovich, together with other accused, on four counts, alleging violations of Title 18, Section 641, U.S.C.A., two counts of grand larceny, and two counts of receiving. The cause came on to trial upon the accused's plea of not guilty to all four counts before a duly impaneled jury. The jury returned a verdict of not guilty on the first and third counts, grand larceny and receiving of moneys allegedly taken from the United States Naval Air Station, Norfolk, Virginia, but returned a verdict of guilty as to the second and fourth counts, grand larceny and receiving of moneys taken from United States Naval Amphibious Base, Little Creek, Virginia. The Court imposed a sentence of ten years on the second count and five years on the fourth count to run concurrently. Notice of Appeal being duly filed to the United States Court of Appeals for the Fourth Circuit, that Court reversed her con-

viction for receiving but affirmed as to the larceny. *Milanovich vs. United States*, 275 F. 2d 716. However, Certiorari was granted by this Court which ultimately reversed the conviction for larceny and the cause was remanded for new trial. *Milanovich v. United States*, 365 U.S. 551.

The accused was again tried in the United States District Court for the Eastern District of Virginia on September 25, 1961, on two counts alleging violation of Title 18, Section 641, U.S.C.A., grand larceny and receiving of certain money from United States Naval Amphibious Base, Little Creek, Virginia. The jury returned a verdict of guilty as to grand larceny, but not guilty as to receiving. The Court thereupon sentenced the accused to be confined for a period of ten years. The accused filed her Notice of Appeal on October 4, 1961.

On December 22, 1961, the accused filed a Motion for New Trial in the District Court based on the grounds that newly discovered evidence disclosed that the prosecutor had been the source of news broadcasts made on the eve of trial which broadcasts contained information prejudicial to the accused. The Motion for New Trial was heard on February 9, 1962, and by Opinion and Order entered March 10, 1962 the trial judge denied said Motion. The accused excepted to the Opinion and Order denying the Motion for New Trial, and noted an appeal therefrom on March 16, 1962.

By consent of counsel and the Circuit Court of Appeals for the Fourth Circuit, the appeal from the judgment of conviction and the appeal from the Order

denying a Motion for New Trial were consolidated and heard together before the Court of Appeals on March 19, 1962.

FACTS

On the 19th day of June, 1958, at approximately 6:30 a.m., Special Agents, Herman Drummond and Marvin E. Steffan, together with a number of other Special Agents of the F. B. I., went to the home of the accused, at which time the home was occupied by the accused, her husband, Mike Milanovich, Clayton Grimmer and Millie Gauger. These Special Agents were admitted to the home by Mike Milanovich, at which time he was advised that he was under arrest. Special Agent Herman Drummond testified that at the time of his arrest, or very shortly thereafter, Mike Milanovich signed a consent-to-search form, and pursuant thereto the house was searched. This officer also testified that accused was present at this time, however, she voiced no objection.

At this point an objection was made to any further testimony by these officers with reference to any other occurrences in the home. The Court heard further testimony of the two Special Agents and argument of defense counsel, out of the presence of the jury. Special Agent Herman Drummond testified that he didn't recall if he had any conversation with accused before the consent-to-search was executed. That accused was not advised that she was under arrest and that no question was posed to her as to any consent-to-search the premises.

Special Agent Marvin E. Steffan testified that he was not present when the consent-to-search was executed by Mike Milanovich. That to his knowledge, no one ever advised accused of her constitutional rights insofar as a search of her property was concerned.

After argument of counsel, the Court found that the consent-to-search the premises given by Mike Milanovich, husband of accused, was given freely and voluntarily, and after being advised of his constitutional rights; that accused was present at the time the consent-to-search the premises was given, and voiced no objection to the search of the premises of accused and her husband, and the search of the premises was in all respects, legal, and any evidence seized as the result of the search was competent to be admitted into evidence.

Whereupon the motion to suppress the evidence was denied, and the objection of the accused to the evidence related to the fruits of the search was overruled, to which the accused objected and excepted.

The accused did not testify in her own behalf.

One week before trial, Joseph Bambacus, the special prosecutor appointed to try the accused, went to Radio Station WNOR in Norfolk, Virginia, and was introduced, as such prosecutor or special assistant to the United States Attorney General, to Wynn Moore, then News Director for the station. Joseph Bambacus then gave to Wynn Moore the background of the pending trial of the accused and, among other things, told the News Director that the accused had various aliases, was a woman with "a long police record on prostitution and liquor charges" and discussed with him whether

the testimony of a witness in the previous trial who had been killed by a bomb blast in his automobile would be admissable in the pending trial. As a result of this information supplied by the prosecutor, this prejudicial matter was broadcast to the general public by Wynn Moore on September 18, 1961, at the hours of 7:00, 7:30, 8:00 and 9:00 P.M.

The decision of the Circuit Court of Appeals filed April 30, 1962 was highly critical of this action of the prosecutor in supplying information prejudicial to the accused to a news broadcaster. Therefore, the prosecutor orally requested the Chief Judge of the Fourth Circuit of Appeals to be heard and the decision amended insofar as it was critical of him. Pursuant to this oral request, a hearing was held on June 4, 1962, in chambers before the Honorable Simon E. Sobeloff, Chief Judge, and Soper and Haynesworth, Circuit Judges. Present at this hearing were the prosecutor and his counsel, Louis Peterson, President of Radio Station WNOR, counsel for the government, and counsel for the accused. The accused was not present. At this hearing, the Court of Appeals heard statements from the prosecutor and Louis Peterson. Based on this hearing, the Court of Appeals by Order entered June 4, 1962 amended its decision previously filed on April 30, 1962.

REASONS FOR GRANTING THE WRIT

I. Is the action of the special prosecutor in being the source of information for news broadcasts made on the eve of trial, which broadcasts refer to prior criminal activities of the accused, such a breach of the proper standards for the enforcement of criminal law in the Federal Courts as to require granting a new trial where it is shown that the jurors did not hear such broadcasts?

The petition for Writ of Certiorari on this question of the improper conduct of the prosecutor is based upon this Court's supervisory authority to formulate and apply proper standards for the enforcement of the criminal law in Federal Courts. *cf, Marshall v. United States,* 360 U.S. 310; *Offut v. United States,* 348 U.S. 11. In the instant case, there can be no question that the improper conduct of the prosecutor was a breach of the proper standards for the enforcement of criminal law.

The Circuit Court of Appeals for the Fourth Circuit pointed out in its advance decision at Page 6, in a footnote, that neither in the hearing on the Motion for New Trial nor before the Court of Appeals did the government take the trouble to deny that the prosecutor made the statements attributed to him. The decision of the Court of Appeals and of the Trial Court on the Motion for a New Trial condemned such actions of the prosecutor. Further, counsel for the government in its Memorandum in Opposition to Motion for New Trial, in its Statement of Facts second paragraph, stated:

> "One week before the trial, in the course of regular news broadcasts over Radio Station WNOR in Norfolk, Virginia, reference was made to the

defendant, the impending trial and her prior criminal activities. These news broadcasts were based on information furnished to the WNOR News Director by Joseph S. Bambacus, former United States Attorney, and, at the time in question, a Special Assistant to the Attorney General."

Thus, it is shown that the special prosecutor at trial in being the source of news broadcasts which contained references to prior criminal activities of the accused seriously breached the proper standards for enforcing criminal law. However, it was found by the trial judge in his decision denying a motion for new trial, that these broadcasts did not reach the ears of any of the jurors at the time of trial. The Circuit Court of Appeals affirmed this finding of the trial judge.

The question, then, is squarely presented as to the effect on the purity of a criminal trial of a prosecutor's highly improper action in being the source of a news broadcast containing information prejudicial to the accused when the broadcasts did not reach the ears of the jurors.

The position of the prosecutor in the Federal system of criminal justice is unique as he represents the sovereignty. As this Court clearly sets fort in *Berger v. United States*, 295 U.S. 78, at page 88:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Can justice be done when the special prosecutor sets in motion news broadcasts prejudicial to the ac-

cused? It is submitted that the cause of justice is unnecessarily harmed and the purity of the trial is so polluted as to require a new trial when the source of prejudicial news broadcasts is traced to the prosecutor.

Where it is claimed that adverse news articles are prejudicial to the fair trial of a case, it has been stated that there are two questions to be determined in deciding an application for mistrial. The first is, what is the source of the objectional matter and whether it is traceable to either of the parties; and, the second is whether the articles complained of have come to the attention of the jury. *United States v. Montgomery*, 42 F. 2d 254. Therefore, where objectionable news broadcasts containing matters prejudicial to the accused are traced to the prosecutor, the interests of the proper enforcement of criminal law require a new trial. This is so as:

> "It is highly important, I think, that the course of justice in this Court should seem, as well as be, free from all outside influence, direct or indirect." *United States v. Montgomery, supra,* at pages 256, 257.

In the Michigan one man grand jury cases, this Court held that fair trials are too important to let prosecuting judges be trial judges on charges they prefer. *In re Murchison*, 349 U.S. 133, 136. Further, in *Offut v. United States*, 348 U.S. 11, this Court reversed a contempt conviction of an attorney where he was convicted by the trial judge on charges growing out of the conduct of the attorney in a trial before such trial judge. In *Offut*, this Court said at Page 17:

> "The question with which we are concerned is not the reprehensability of petitioner's conduct and the consequences which he should suffer. Our concern is with the fair administration of justice."

In the instant petition, it is submitted that in the interests of the fair administration of justice, Certiorari should be granted to determine whether the actions of the special prosecutor require granting a new trial. Further, where the prosecutor was the source of prejudicial news sources, even where it was not shown that the jury had access to these prejudicial articles, that such action was so damaging to the cause of justice as to require a new trial. *Henslee v. United States*, 246 F. 2d 190, *cert. den.* 359 U.S. 984.

II. Is it error for the Circuit Court of Appeals to amend its decision in a criminal matter on the basis of unsworn statements made by the prosecutor at an ex parte hearing at which the accused is not present, such hearing being held after the rendering of its decision by such Circuit Court of Appeals?

The instant cases were argued before the Circuit Court of Appeals for the Fourth Circuit on March 19, 1962, they being consolidated for argument by consent of all counsel and the Court. The Court entered its decision April 30, 1962. As the decision as originally filed, was highly critical of the prosecutor, the prosecutor orally requested the Honorable Simon E. Sobeloff, Chief Judge, Fourth Circuit Court of Appeals, to be heard in the matter and the decision to be amended insofar as it was critical of him. The hearing was set for June 4, 1962, at Asheville, North Carolina, and was held before the Honorable Simon E. Sobeloff, Chief Judge, and Soper and Haynesworth, Circuit Judges. Present at the hearing were counsel for the government, the prosecutor and his counsel, Louis H. Peterson, owner of Radio Station WNOR, and counsel for the accused. The accused was not present. At this hearing in

chambers, the Court heard the prosecutor and Louis H. Peterson. Based on this hearing, the Court entered an Order on June 4, 1962, amending its original decision.

It is submitted that the Court erred in amending its decision based on this ex parte hearing and ex parte statements taken without the presence of the accused. The authority and jurisdiction of a Circuit Court of Appeals, an appellate court, is well settled. An appellate court does not try a case de novo, but reviews alleged errors of law which are shown by the record taken in the trial court. *Litton v. United States,* 177 F. 2d 416, *cert. den.* 339 U.S. 921. Certainly, the Circuit Court of Appeals does not review alleged errors of the trial court on the basis of statements taken after proceedings in the trial court have terminated. *See, Phillips v. United States,* 218 F. 2d 385.

Here we have a Circuit Court of Appeals, in effect, taken unsworn testimony without the presence of the accused. It is submitted that the Circuit Court in so acting was hearing the case de novo and taking testimony, both of which being beyond its authority and jurisdiction, was error. It is further submitted, that in so acting, the Circuit Court of Appeals was showing more concern for a prosecutor than for an accused in a criminal matter, all of which is inimical to the cause of justice.

III. Is a wife's right of privacy under the Fourth Amendment violated by a general search of her personal belongings during a search made pursuant to a consent to search given by the husband at the time of his arrest?

During trial, trial counsel moved to suppress government's Exhibit 41, a woman's overnight bag or train case, and Exhibits 44 and 44A, silver coins. The trial court denied this motion to suppress on the grounds of it not being timely under Rule 41(e) and on the merits. The Circuit Court of Appeals affirmed on the grounds that the motion to suppress was not timely.

At the outset, counsel concedes that a timely motion to suppress pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure was not made. Present counsel did not come into the case until after the trial had terminated. However, no reason or excuse had been offered him as to why a timely motion to suppress was not made.

It is submitted that the Circuit Court erred in not considering the legality of the questioned search and seizure purely on the grounds that it was not timely. The trial court determined this question both on the grounds of its timeliness and on its merits. Thus, the question on the merits was preserved for review by the Circuit Court if that forum wished to hear it. In *Jones v. United States*, 362 U.S. 257, the petitioners attacked the legality of a search warrant in the Court of Appeals on grounds not used in the trial court. The Court of Appeals heard this attack on the search and seizure raised for the first time in the Court of Appeals, and this Court held that as the Court of Appeals heard the question, it was properly before the Supreme

Court. Further, this Court explained Rule 41(e) in *Jones, supra*, at Page 264:

> "This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystalization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. [Citing cases]. As codified, the rule is not a rigid one, for under Rule 41(e) "the Court in its discretion may entertain the motion [to suppress] at the trial or hearing." This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement."

Here, it is submitted, we have an important social policy to consider. The questioned search and seizure was effected by some five agents of the Federal Bureau of Investigation at the home of the accused where the agents came to arrest the accused's husband and one Clayton Grimmer, then visiting in the home of the accused and her husband. The accused's husband executed a consent to search his home at the time he was arrested. Evidence at re-trial indicated that the accused was present when her husband signed this consent to search form. It is significant that no evidence was offered suggesting that the accused was asked to consent to the search of her home or personal belongings. As a result of the search authorized by the husband's consent, the accused's overnight bag, or train case, obviously a female's piece of luggage, was seized, becoming government's Exhibit 41, and silver coins within the bag subsequently government's Exhibit 44 and 44A, were seized.

There is no question that the search as to the accused's husband was valid on the grounds of his consent or on the grounds of a search incident to his arrest. The question does arise as to whether a husband's consent to search or a search incident to the arrest of the husband in his home authorizes agents of the government to rummage through the obviously personal property and effects of the wife which are also in the home. It is submitted that such a search violates the wife's right of privacy guaranteed under the Fourth Amendment.

It is well settled that the Fourth Amendment prohibits only unreasonable searches. A search is unreasonable unless it is authoribed by a valid search warrant, is incident to a valid arrest, or was made in such exceptional circumstances as to dispense with a need for search warrant, arrest, or consent. *Williams v. United States*, 263 F.2d 487. Here, as to the accused, there was no arrest, she not even being under suspicion at time of the search, there was no search warrant, and there was no consent given by the accused for the search of her personal belongings.

It is submitted that there is no valid basis on which to uphold a search and seizure of the accused's personal belongings. Certainly, it can not be urged that one spouse can waive the rights of another under the Fourth Amendment. An official superior can not consent to the search of an underling's desk, *United States v. Blok*, 188 F.2d 1019, 1021; a daughter can not consent to the search of her mother's personal effects on premises controlled by the daughter, *Holzhey v. United States*, 223 F.2d 823; and a wife can not bind her absent husband by waiving a legal warrant or consenting to an unau-

thorized search, *Cofer v. United States*, 37 F.2d 677, 679; *cf., Foster v. United States*, 281 F.2d 310. Further, the accused can not be held to have consented to the search of her personal belonging merely because she did not protest. *Karwicki v. United States*, 55 F.2d 225. Where there is no search warrant, the burden is on the government to show that the search was voluntary. *Kovach v. United States*, 53 F.2d 639; *Canida v. United States*, 250 F.2d 822. There has been no showing by the government that the accused voluntarily consented to the search of her personal belongings and effects.

For the foregoing reasons, it is submitted that the search and seizure of what obviously were the accused's, a wife's, personal belongings, during a search incident to the husband's arrest and his consent to search, was invalid as an unreasonable search and seizure under the Fourth Amendment. Therefore, the Circuit Court of Appeals erred in not considering this question on its merits, and this Court should grant Certiorari to determine this very serious question concerning social policy.

Respectfully submitted,

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APPENDIX

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

UNITED STATES OF AMERICA

v. Criminal No. 11,696

VIRGINIA MILANOVICH

C. Vernon Spratley, Jr., United States Attorney for the Eastern District of Virginia, and Roger T. Williams, Assistant United States Attorney for the Eastern District of Virginia,

for the United States of America.

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for the Defendant.

OPINION AND ORDER

EDWIN M. STANLEY, District Judge

On September 29, 1961, a jury found the defendant guilty of the theft of a sum of Government money from the United States Naval Amphibious Base, Little Creek, Virginia, in violation of Section 641 of Title 18, United States Code. A sentence of imprisonment was imposed. The defendant had previously been convicted by a jury on separate counts of larceny and receiving, but this conviction was set aside due to the fact that the jury had not been instructed that it could convict

the defendant of either larceny or receiving, but not of both. *Milanovich v. United States*, 365 U.S. 551.

Following her conviction and the imposition of sentence, the defendant gave timely notice of appeal to the Court of Appeals for the Fourth Circuit, and the matter is now pending before that Court.

On December 22, 1961, almost three months after the trial, the defendant filed a motion for a new trial on the ground of newly discovered evidence consisting of alleged misconduct on the part of Government counsel in furnishing a Norfolk radio station with certain information concerning the defendant's background, and the broadcasting of this information about a week in advance of the trial. Specifically, it is alleged that on September 18, 1961, Joseph Bambacus, Esquire, a Special Assistant to the Attorney General of the United States, and who had been employed to prosecute this case on behalf of the Government, went to Radio Station WNOR in Norfolk, Virginia, the city where the trial was later conducted, and gave to Wynn Moore, the news director for the station, certain information relating to the defendant's forthcoming trial, and that solely from the information furnished by Mr. Bambacus, the following news broadcasts were made over Station WNOR on September 18, 1961, at the hours of 7 o'clock p.m., 7:30 o'clock p.m., 8 o'clock p.m., and 9 o'clock p.m.:

> "A woman with a long record of arrests on charges of prostitution and liquor sales comes to trial Monday in Federal Court to face robbery charges for the second time. Virginia Milanovich, alias Caufman, alias Russo and several others, will be retried on charges of burglary and receiving

stolen goods from the Commissary at the Little Creek Amphibious Base in 1958. The first trial found her guilty of both charges but the Supreme Court reversed the decision saying that the jury should have been instructed to bring in a verdict of guilty on only one of the charges. The case has been made more difficult by the murder of one of the witnesses. Chris Sofocleous, one of the thieves, turned states evidence and was later killed when his car was bombed in the prescribed gangland style. WNOR News has learned that the prosecutor, Joseph Bambacus, Special Assistant to Robert Kennedy, will attempt to have the transcript of the Sofocleous testimony entered and word has it that the evidence will be accepted. We tried to get confirmation of this from Mr. Bambacus with this result. . . ."

The motion was heard on February 9, 1962. The defendant relied solely upon the deposition and affidavit of Wynn Moore, which simply refers to the news broadcasts and his source of information. The Government offered the testimony of Louis H. Peterson, President and owner of Radio Station WNOR, who testified that on September 18, 1961, Mr. Bambacus, who was then a practicing attorney in the City of Richmond, Virginia, in addition to being a Special Assistant to the Attorney General of the United States for the purpose of prosecuting the defendant, had previously been retained to represent the radio station in connection with an employment contract; that he heard Mr. Bambacus was in Norfolk, and arranged for a luncheon engagement with him; that following the luncheon, he and Mr. Bambacus went to the offices of the radio station to examine certain correspondence; that during the course of their conversation, Mr. Bambacus advised that he was in Norfolk to prepare for the Milano-

vich trial; that he asked Mr. Bambacus if he would give his news director a story concerning the trial; that Mr. Bambacus replied that any information he gave would have to be rather limited, and that he could give no more than factual information concerning matters that were of common knowledge; that he thereupon arranged for Wynn Moore, his news director, to come into his office and interview Mr. Bambacus; that Mr. Bambacus did not seek out either him or Mr. Moore for the purpose of giving them a story. The Government also offered the testimony of Virginia Manning, Deputy Clerk of the Circuit Court of the City of Norfolk, who identified the original of a court file relating to a libel action the defendant commenced against the Norfolk Broadcasting Corporation, individually and trading as WNOR Radio, Jack Harris and Wynn Moore, on September 21, 1961, as a result of the radio broadcasts hereinbefore referred to. The complaint made specific reference to the broadcasts and quoted certain portions of the language used. The file indicated that the deposition of Wynn Moore, which was attached to the motion for a new trial, had been taken without notice to either the Government or any of the defendants in the civil action. The file further indicated that a voluntary non suit had been taken in the libel action on January 15, 1962. Counsel for the Government stated that the testimony of Mr. Bambacus was not being offered due to the fact that he was ill and confined to his bed.

Rule 33 of the Federal Rules of Criminal Procedure, 28 USCA, governs motion for a new trial, and all such motions, except those based on the ground of newly discovered evidence, must be made within

five days after verdict, or within such further time as the court may fix during the five-day period. Motions based on the ground of newly discovered evidence may be made at any time within two years after verdict. Normally, in a motion for a new trial based on newly discovered evidence, the movant must establish that the evidence was discovered since the trial; diligence on the part of the movant must be demonstrated; the evidence must not be merely cumulative or impeaching; the evidence must be material to the issue involved; and it must be such that on a new trial the newly discovered evidence would probably produce an acquittal. *Mills v. United States*, 4 Cir., 281 F. 2d 736 (1960). The defendant readily concedes that she has not met these requirements. She knew of the broadcasts at the time they were made, and had commenced a libel proceding against the radio station in state court prior to the commencement of the criminal trial. The only fact newly discovered was the source of the information upon which the broadcasts were based, and there has been no showing that this fact could not have been discovered before or during the criminal trial by the exercise of diligence on the part of the defendant. Neither the broadcasts nor the source of the information is material to the substantive issue involved, and would not be competent upon a re-trial of the case. Under these circumstances, it would necessarily follow that if the alleged newly discovered evidence bears upon the substantive issue of guilt, the motion must be denied as a matter of law on the ground that it was not made within five days after the verdict. *Mills v. United States*, 4 Cir., 281 F. 2d 736 (1960). However, if the motion bears upon the integrity of the trial, and the evidence in support thereof is in every sense newly discovered, the

defendant is not bound by the requirement set out in the *Mills* case, and may make her motion at any time within two years after verdict. *Holmes v. United States*, 4 Cir., 284 F. 2d 716 (1960). Our inquiry then is whether the motion is founded upon after discovered evidence which bears upon or affects the jury's verdict.

Having been advised by counsel for the Government and the defendant that the first trial resulted in considerable publicity in the Norfolk area, and the likelihood of considerable publicity in advance of and during the second trial, the court requested a conference with counsel in advance of the trial for the purpose of discussing various methods of insuring the defendant a completely fair and impartial trial, including the advisability of a change of venue and keeping the jury together from the time they were empaneled until the verdict. Counsel for the defendant stated that no change of venue was desired, and that he preferred that the jury not be kept together during the trial.

The court meticulously examined the jurors on *voir dire* to determine whether or not any of them had any knowledge whatever of the case through any news media, discussions with other persons, or otherwise. Practically every juror that acknowledged any prior acquaintance whatever with the case was excused by the court. Counsel for the Government and the defendant were invited to suggest additional questions they desired asked on the *voir dire* examinations. So searching was the inquiry regarding prior information concerning the case that the defendant only exercised two of her ten peremptory challenges. One juror stated that he had read something of the case in the newspapers but that it made no impression on his mind. The

defendant was apparently satisfied with the qualifications of this juror since she did not excuse him by exercising one of her eight remaining peremptory challenges.

After the jury was selected and empaneled, counsel and the defendant were requested to appear in chambers for a conference. The parties were advised that the court wanted to do everything possible to insure the integrity of the verdict of the jury, and that the court would again entertain any suggestions made by the defendant or by counsel that would be helpful in this regard. The defendant and her counsel expressed complete satisfaction with the selection of the jury and stated that they did not desire that the jury be kept together during the trial.

The defendant now argues that the simple fact that the Government counsel was the source of the information contained in the broadcasts is alone sufficient to entitle her to a new trial, and that this is true without regard to whether any of the jurors heard the broadcasts or the purity of the trial was in any way affected. This argument is based on certain language found in *Henslee v. United States*, 5 Cir., 246 F. 2d 190 (1957). If the *Henslee* case is authority for such argument, it is clear that the holding was repudiated by the Fifth Circuit a year later in *Massicot v. United States*, 5 Cir., 254 F. 2d 58 (1958). In the *Massicot* case, the Assistant United States Attorney had given erroneous and prejudicial information to the press, radio and television with respect to two of the defendants during the course of the trial. Following publication of the prejudicial information in the press, the defendants moved for a mistrial. Upon being satisfied that none of the jurors

had read the newspaper article, the court over-ruled the motion for a mistrial. Following the return of the jury verdict, the defendants moved for a new trial based on newly discovered evidence which consisted of the text of radio and television reports which had been broadcast on the second and third days of the trial. Government counsel was also the source of these reports. Upon being questioned, all twelve of the jurors stated that they had not heard the radio and television reports. The motion for a new trial was thereupon denied. The language used by the Court of Appeals in the *Massicot* case (254 F. 2d 58, 64), in affirming the district judge in denying the motions for a mistrial and a new trial, is appropriate here:

> ". . . While we recognize that the Government attorney did overstep the bounds of proper conduct by inadvertently making a public statement concerning the Donnelly exhibit, what is important here is that the jurors swore that they did not read or know of the prosecutor's statement. Consequently, it cannot be said that the jury or any juror had been improperly influenced or in any way affected by the publication and broadcasts complained of, or that the purity of the trial was destroyed. The trial judge exercised scrupulous care and took appropriate action when the matter was called to his attention and was satisfied to proceed. His discretion does not appear to have been abused." (Citing cases).

While it was highly improper for the prosecuting attorney to give out information to the radio station concerning the forthcoming trial of the defendant, it does not follow that this fact alone entitles the defendant to a new trial. The court is completely satisfied that no member of the jury even knew that the broad-

casts had been made, and is further satisfied that the broadcasts in no way affected the purity of the trial. The defendant has not even attempted to make a contrary showing.

The evidence of the defendant's guilt was overwhelming. It is inconceivable that the Government should be put to the trouble and expense of another trial simply because of some inadvertence on the part of the prosecution, without any showing whatever that any juror, or the purity of the trial, was affected in the slightest by the inadvertence.

ORDER

IT IS ORDERED that the motion of the defendant for a new trial on the ground of newly discovered evidence be and the same is hereby denied.

/s/ EDWIN M. STANLEY
United State District Judge
(Sitting by Designation)

March 10, 1962

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 8493

United States of America,
Appellee,
versus
Virginia Milanovich,
Appellant.

No. 8613

United States of America,
Appellee,
versus
Virginia Milanovich,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued March 19, 1962 Decided April 30, 1962)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Calvin H. Childress and Herbert S. Reid, Jr., for Appellant, and Roger T. Williams, Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

SOBELOFF, Chief Judge:

In December, 1958, Virginia Milanovich was tried and convicted on an indictment charging larceny and receiving under 18 U.S.C.A. § 641. She was sentenced to ten years imprisonment on the larceny count and five years on the receiving count, the sentences to run concurrently. On appeal, this court reversed her conviction for receiving but affirmed as to the larceny. *Milanovich v. United States*, 275 F. 2d 716 (1960). The Supreme Court reversed our decision and ordered a new trial. *Milanovich v. United States*, 365 U.S. 551 (1961). Tried again, she was found guilty of larceny and sentenced a second time to ten years imprisonment.[1]

This is her appeal from that conviction. Her chief complaint is that certain evidence introduced by the Government at the trial was seized by federal officers in violation of the Fourth Amendment. The District Court ruled that it would not consider the objection, on the ground that no motion to suppress the evidence had been made prior to trial, as prescribed by Rule 41(e), Fed. R. Crim. P., and no excuse was offered for this failure and, on the alternative ground based on the merits, that the fact failed to show an illegal search and seizure.

The alleged illegal seizure occurred on June 19, 1958, when Federal officers went to the Milanovich home to arrest Mike Milanovich, Virginia's husband, who was suspected of involvement in two recent robberies of United States Naval Bases in Virginia. They

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1 As directed by the Supreme Court, the District Court submitted both the larceny count and the receiving count to the jury with an instruction that they could find the defendant guilty of only one of the charges. *Milanovich v. United States*, 365 U.S. 551, 555-56 (1961).

had a warrant for his arrest, which was duly executed. While there, the officers, in the presence of Virginia Milanovich, obtained her husband's consent to search the house. Pursuant to his written authorization on a "consent to search" form, the officers searched the house and in a closet in the guest bedroom found an overnight bag containing about $500.00 in wrapped silver coins identified as having been stolen from the Naval base. At that time Virginia Milanovich admitted ownership of the bag but denied possession, stating that she had loaned it to the friend then staying at the Milanovich home. The bag and contents were confiscated by the officers, and it is in respect to the seizure of this evidence that the defendant claims a violation of her constitutional rights.

The defendant was indicted and arrested on July 16, 1958, and her first trial was held on December 10 of that year. No motion to suppress was filed prior to that trial, and, indeed, the evidence here challenged was introduced there against Virginia and her co-defendant husband without objection. The Supreme's Court's mandate ordering a new trial was handed down on April 25, 1961. Again no motion to suppress was made in the several months preceding the second trial on September 25, 1961. Only when the Government tendered the evidence on the second day of the second trial was the objection interposed and the illegality of the search asserted for the first time.

Under these circumstances, we think that the District Court acted within the bounds of its discretion in declining to entertain the objection. Rule 41(e) provides in relevant part that "the motion [to suppress] shall be made before trial or hearing, unless opportun-

ity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Clearly the present case does not fall within the specified exceptions. Ample time existed for making the motion (five months before the first trial and another five months before the second), and indisputably the defendant had full knowledge of the circumstances of the seizure. See *Isaacs v. United States*, 283 F. 2d 587 (10th Cir., 1960); *United States v. Romero*, 249 F. 2d 371, 374 (2d Cir. 1957); *United States v. Chieppa*, 241 F. 2d 635, 637-38 (2d Cir. 1957), *cf. Jones v. United States*, 362 U.S. 257, 264 (1960).

Still, we would be loath to hold that, for the sake of procedural orderliness, the defendant was disqualified from pressing her claim during the course of trial if some explanation had been made to appear for her failure to comply with Rule 41(e), other than neglect. *Cf. Gouled v. United States*, 255 U.S. 298, 312-13 (1921)[2]; *Ganci v. United States*, 287 Fed. 60, 66-67 (2d Cir. 1923). Nothing of this character is offered. True, the defendant's present attorneys did not enter the case until a week before the second trial, but she had almost constant legal representation from the time proceedings were begun against her in 1958.

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2 In the *Gouled* case, the Court had this to say about the application of the then prevailing rule, which has been substantially incorporated in Rule 41(e), that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained: "While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not be to applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, ..." 255 U.S. at 312.

In addition, we think that the defendant is not in a position to avail herself of the rule announced in *Amos v. United States*, 255 U.S. 313 (1921). There the testimony of government witnesses at the trial showed a clear violation of Fourth Amendment rights, and the Court held that in those circumstances the trial judge had no discretion to decline to consider the objection to the evidence even though advanced while the trial was in progress. Here, in contrast, it is far from clear that there was an illegal search and seizure; seemingly Mrs. Milanovich's acquiesence when her husband consented to the search was part of a deliberate design on her part to cast full responsibility for the presence of the stolen money upon either her husband or the house guest. Refusal to entertain the belated objection was not error.

A second issue presented on this appeal relates to the conduct of the special assistant to the Attorney General of the United States, assigned to prosecute this case for the Government. Raised on a motion for new trial filed some three months after final judgment, the complaint is that the prosecutor volunteered information to a local radio station concerning Mrs. Milanovich's alleged criminal record. The prosecutor happened to be the attorney for the radio station. When there for consultation on other matters, he made the statements about the appellant at the solicitation of the news broadcaster, with knowledge that they would be repeated over the air. His assertions that Mrs. Milanovich was a woman with a long record of arrests on charges of prostitution and liquor sales were broadcast at least three times during the week preceding the second trial. The motion for a new trial based upon

this ground has, by consent of the parties, been made part of the main appeal.

The Government makes no attempt to defend the conduct of its prosecutor. Indeed, it concedes that it constituted a violation of the duties and responsibilities of his office. It argues, however, that this malfeasance alone, in the absence of some actual prejudice to the accused, is not sufficient to nullify the conviction. On the other hand, the defendant contends that a showing of prejudice is not essential and that a new trial should have been ordered.

The broadcasts in question were known to the defendant at the time of trial, although she did not know until later the source of the statements. The broadcasts were brought to the court's attention at the opening of the trial, and the court instituted an immediate and careful inquiry. On voir dire, all prospective jurors were questioned to determine whether they had heard the broadcasts or read anything in the newspapers concerning the defendant. Of the twelve finally selected, none had heard the broadcasts and only one had read anything in the paper about the defendant and he was unable to recall what it was he had read. Pointing up the extreme care of the court in assuring a fair trial by readily excusing for cause all prospective jurors who had been exposed to the broadcasts, it is noteworthy that the defendant exercised only two of her ten permissible peremptory challenges. Furthermore, the judge voluntarily offered to grant a continuance or change of venue if the defendant so desired. She chose to proceed to trial.

Whenever it appears that shortly before a trial public news media in the community have published

incompetent and prejudicial information about the case or the defendant, a duty devolves upon the trial court to make certain that the necessary conditions of a fair trial have not been impaired. Prospective jurors should be closely examined to determine whether they have been exposed to the improper information, and, if so, whether they can lay aside what has been heard in reaching a verdict. See *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). If the prosecutor, an officer of the court, is implicated in the dissemination of such information, the occurrence should be scrutinized with special concern. See *Holmes v. United States*, 284 F. 2d 716, 817 (4th Cir. 1960); *Massicot v. United States*, 254 F. 2d 58, 62-63 (5th Cir. 1958); *cf. Janko v. United States*, 281 F. 2d 156, 169-70 (8th Cir. 1960). If the publication is shown to have reached the prospective jurors, they should be excused if there is any doubt about their partiality. When discovery of such events is made after the jury is sworn, then a new trial is mandatory unless the Government can affirmatively show that the jurors could not have been affected by it. See *Marshall v. United States*, 360 U.S. 310 (1959); *Shepherd v. Florida*, 341 U.S. 50 (1951) (concurring opinion). In the latter instance the burden is not upon the defendant to establish that he was prejudiced thereby.

In the present case, the publication was of such a character as to call for investigation, and the presiding judge, recognizing his duty, made a conscientious inquiry. What emerged, however, is not a case leaving one in doubt as to whether jurors were affected by information brought to their attention. Here the record unequivocally establishes that the offensive broadcasts did not reach the ears of anyone who was permitted to

serve on the jury and that by no possibility could the broadcasts have had any influence. Indeed, the defendant concedes as much. Her insistence is not that prejudicial matter affected the jurors to deprive her of their impartial judgment. Rather, the thrust of her argument is that the misconduct of the prosecutor should be punished by granting her a new trial, even though it could have had no impact upon the trial.[3]

A prosecutor who supplies a radio station with adverse information to be disseminated about a defendant on the eve of trial commits a gross violation of professional properiety meriting severe condemnation. Whether it calls for disciplinary action is a matter for the District Court. But while we are deeply concerned about this misconduct, we are not prepared to upset the conviction for the defendant has had her day in court before a jury whose fairness she herself does not impugn. The judgment is

Affirmed.

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3 *Henslee v. United States*, 246 F. 2d 190, 193 (5th Cir. 1957), is cited in support of the argument, but that case is distinguishable. There, unlike the present case, some doubt existed whether the Government had affirmatively demonstrated that th jurors had not seen the improper publication.

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 8493.

United States of America,
Appellee,
versus
Virginia Milanovich,
Appellant.

No. 8613

United States of America,
Appellee,
versus
Virginia Milanovich,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

It is ordered that the opinion filed in the above-entitled cases on April 30, 1962, be amended in the following particulars:

In the sixteenth line on page 5, change the word "complaint" to "allegation"; in the twentieth line on page 5, add the word "allegedly" between the words "he" and "made"; in the first line on page 6, change the word "the" to "such"; in the second line on page 6, change the word "its" to "a", and the word "constitut-

ed" to "constitutes"; add the following footnote after the word "office" in line three on page 6: "Neither in the hearing in the District Court on the motion for a new trial, nor here, did the Government take the trouble to deny that the statements were made."; in the fourth line on page 6, change "this" to "such"; in the fifth line on page 6, eliminate the word "is" and add the word "would" after the word "accused" and the word "be" after the word "not"; that the sentence in the twelfth and thirtheenth lines on page 8, reading "Whether it calls for disciplinary action is a matter for the District Court." be eliminated therefrom; that the word "this" appearing in the fourteenth line on page 8, be eliminated; and the words "of this type," be added after the word "misconduct" in that line; and that the following be added as an Addendum to the opinion:

"In the absence of any evidence in the District Court from the special prosecutor, who was ill when the motion for a new trial was heard, the trial court assumed that the version given in the deposition of the newscaster was true, but held, nevertheless, that the jury was not influenced since they had not heard or learned of the broadcast. In fairness to the prosecutor we should add that since the publication of our opinion he has stated to us that he gave no information to the broadcasting station that it did not already possess."

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

A true copy,
Teste:
Richard M. F. Williams, Jr., Clerk
U. S. Court of Appeals for the Fourth Circuit
By Margaret L. Davis, Deputy Clerk

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 8493.

United States of America,
Appellee,
versus
Virginia Milanovich,
Appellant.

No. 8613.

United States of America,
Appellee,
versus
Virginia Milanovich,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued March 19, 1962. Decided April 30, 1962)
(Addendum filed June 4, 1962)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Calvin H. Childress and Herbert S. Reid, Jr., for Appellant, and Roger T. Williams, Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

SOBELOFF, Chief Judge:

In December, 1958, Virginia Milanovich was tried and convicted on an indictment charging larceny and receiving under 18 U.S.C.A. § 641. She was sentenced to ten years imprisonment on the larceny count and five years on the receiving count, the sentences to run concurrently. On appeal, this court reversed her conviction for receiving but affirmed as to the larceny. *Milanovich v. United States*, 275 F.2d 716 (1960). The Supreme Court reversed our decision and ordered a new trial. *Milanovich v. United States*, 365 U.S. 551 (1961). Tried again, she was found guilty of larceny and sentenced a second time to ten years imprisonment.[1]

This is her appeal from that conviction. Her chief complaint is that certain evidence introduced by the Government at the trial was seized by federal officers in violation of the Fourth Amendment. The District Court ruled that it would not consider the objection, on the ground that no motion to suppress the evidence had been made prior to trial, as prescribed by Rule 41(e), Fed. R. Crim. P., and no excuse was offered for this failure and, on the alternative ground based on the merits, that the facts failed to show an illegal search and seizure.

The alleged illegal seizure occurred on June 19, 1958, when federal officers went to the Milanovich home to arrest Mike Milanovich, Virginia's husband who was suspected of involvement in two recent robberies of United States Naval bases in Virginia. They

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1 As directed by the Supreme Court, the District Court submitted both the larceny count and the receiving count to the jury with an instruction that they could find the defendant guilty of only one of the charges. *Milanovich v. United States*, 365 U.S. 551, 555-56 (1961).

had a warrant for his arrest, which was duly executed. While there, the officers, in the presence of Virginia Milanovich, obtained her husband's consent to search the house. Pursuant to his written authorization on a "consent to search" form, the officers searched the house and in a closet in the guest bedroom found an overnight bag containing about $500.00 in wrapped silver coins identified as having been stolen from the Naval base. At that time Virginia Milanovich admitted ownership of the bag but denied possession, stating that she had loaned it to the friend then staying at the Milanovich home. The bag and contents were confiscated by the officers, and it is in respect to the seizure of this evidence that the defendant claims a violation of her constitutional rights.

The defendant was indicted and arrested on July 16, 1958, and her first trial was held on December 10 of that year. No motion to suppress was filed prior to that trial, and, indeed, the evidence here challenged was introduced there against Virginia and her co-defendant husband without objection. The Supreme Court's mandate ordering a new trial was handed down on April 25, 1961. Again no motion to suppress was made in the several months preceding the second trial on September 25, 1961. Only when the Government tendered the evidence on the second day of the second trial was the objection interposed and the illegality of the search asserted for the first time.

Under these circumstances, we think that the District Court acted within the bounds of its discretion in declining to entertain the objection. Rule 41(e) provides in relevant part that "the motion [to suppress] shall be made before trial or hearing, unless opportun-

ity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Clearly the present case does not fall within the specified exceptions. Ample time existed for making the motion (five months before the first trial, and another five months before the second), and indisputably the defendant had full knowledge of the circumstances of the seizure. See *Isaacs v. United States*, 283 F.2d 587 (10th Cir. 1960); *United States v. Romero*, 249 F.2d 371, 374 (2d Cir. 1957); *United States v. Chieppa*, 241 F.2d 635, 637-38 (2d Cir. 1957); *cf. Jones v. United States*, 362 U.S. 257, 264 (1960).

Still, we would be loath to hold that, for the sake of procedural orderliness, the defendant was disqualified from pressing her claim during the course of trial if some explanation had been made to appear for her failure to comply with Rule 41(e), other than neglect. *Cf Gouled v. United States*, 255 U.S. 298, 312-13 (1921)[2]; *Ganci v. United States*, 287 Fed. 60, 66-67 (2d Cir. 1923). Nothing of this character is offered. True, the defendant's present attorneys did not enter the case until a week before the second trial, but she had almost constant legal representation from the time proceedings were begun against her in 1958.

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2 In the *Gouled* case, the Court had this to say about the application of the then prevailing rule, which has been substantially incorporated in Rule 41(e), that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained: "While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, * * * *." 255 U.S. at 312.

In addition, we think that the defendant is not in a position to avail herself of the rule announced in *Amos v. United States*, 255 U.S. 313 (1921). There the testimony of government witnesses at the trial showed a clear violation of Fourth Amendment rights, and the Court held that in those circumstances the trial judge had no discretion to decline to consider the objection to the evidence even though advanced while the trial was in progress. Here, in contrast, it is far from clear that there was an illegal search and seizure; seemingly Mrs. Milanovich's acquiescence when her husband consented to the search was part of a deliberate design on her part to cast full responsibility for the presence of the stolen money upon either her husband or the house guest. Refusal to entertain the belated objection was not error.

A second issue presented on this appeal relates to the conduct of the special assistant to the Attorney General of the United States, assigned to prosecute this case for the Government. Raised on a motion for new trial filed some three months after final judgment, the allegation is that the prosecutor volunteered information to a local radio station concerning Mrs. Milanovich's alleged criminal record. The prosecutor happened to be the attorney for the radio station. When there for consultation on other matters, he allegedly made the statements about the appellant at the solicitation of the news broadcaster, with knowledge that they would be repeated over the air. His assertions that Mrs. Milanovich was a woman with a long record of arrests on charges of prostitution and liquor sales were broadcast at least three times during the week preceding the second trial. The motion for a new trial based upon this

ground has, by consent of the parties, been made part of the main appeal.

The Government makes no attempt to defend such conduct of a prosecutor. Indeed, it concedes that is constitutes a violation of the duties and responsibilities of his office*. It argues, however, that such malfeasance alone, in the absence of some actual prejudice to the accused, would not be sufficient to nullify the conviction. On the other hand, the defendant contends that a showing of prejudice is not essential and that a new trial should have been ordered.

The broadcasts in question were known to the defendant at the time of trial, although she did not know until later the source of the statements. The broadcasts were brought to the court's attention at the opening of the trial, and the court instituted an immediate and careful inquiry. On voir dire, all prospective jurors were questioned to determine whether they had heard the broadcasts or read anything in the newspapers concerning the defendant. Of the twelve finally selected, none had heard the broadcasts and only one had read anything in the paper about the defendant and he was unable to recall what it was he had read. Pointing up the extreme care of the court in assuring a fair trial by readily excusing for cause all prospective jurors who had been exposed to the broadcasts, it is noteworthy that the defendant exercised only two of her ten permissible peremptory challenges. Furthermore, the judge voluntarily offered to grant a continuance, or

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* Neither in the hearing in the District Court on the motion for a new trial, nor here, did the Government take the trouble to deny that the statements were made.

change of venue if the defendant so desired. She chose to proceed to trial.

Whenever it appears that shortly before a trial public news media in the community have published incompetent and prejudicial information about the case or the defendant, a duty devolves upon the trial court to make certain that the necessary conditions of a fair trial have not been impaired. Prospective jurors should be closely examined to determine whether they have been exposed to the improper information, and, if so, whether they can lay aside what has been heard in reaching a verdict. See *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). If the prosecutor, an officer of the court, is implicated in the dissemination of such information, the occurrence should be scrutinized with special concern. See *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960); *Massicot v. United States*, 254 F.2d 58, 62-63 (5th Cir. 1958); *cf. Janko v. United States*, 281, F.2d 156, 169-70 (8th Cir. 1960). If the publication is shown to have reached the prospective jurors, they should be excused if there is any doubt about their partiality. When discovery of such events is made after the jury is sworn, then a new trial is mandatory unless the Government can affirmatively show that the jurors could not have been affected by it. See *Marshall v. United States*, 360 U.S. 310 (1959); *Shepherd v. Florida*, 341 U.S. 50 (1951) (concurring opinion). In the latter instance the burden is not upon the defendant to establish that he was prejudiced thereby.

In the present case, the publication was of such a character as to call for investigation, and the presiding judge, recognizing his duty, made a conscientious inquiry. What emerged, however, is not a case leaving

one in doubt as to whether jurors were affected by information brought to their attention. Here the record unequivocally establishes that the offensive broadcasts did not reach the ears of anyone who was permitted to serve on the jury and that by no possibility could the broadcasts have had any influence. Indeed, the defendant concedes as much. Her insistence is not that prejudicial matter affected the jurors to deprive her of their impartial judgment. Rather, the thrust of her argument is that the misconduct of the prosecutor should be punished by granting her a new trial, even though it could have had no impact upon the trial[3].

A prosecutor who supplies a radio station with adverse information to be disseminated about a defendant on the eve of trial commits a gross violation of professional propriety meriting severe condemnation. But while we are deeply concerned about misconduct of this type, we are not prepared to upset the conviction for the defendant has had her day in court before a jury whose fairness she herself does not impugn. The judgment of conviction and the order overruling the motion for a new trial are

Affirmed.

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3 *Hensley v. United States*, 246 F. 2d 190, 193 (5th Cir. 1957), is cited in support of the argument, but that case is distinguishable. There, unlike the present case, some doubt existed whether the Government had affffirmatively demonstrated that the jurors had not seen the improper publication.

ADDENDUM

In the absence of any evidence in the District Court from the special prosecutor, who was ill when the motion for a new trial was heard, the trial court assumed that the version given in the deposition of the newscaster was true, but held, nevertheless, that the jury was not influenced since they had not heard or learned of the broadcast. In fairness to the prosecutor we should add that since the publication of our opinion he has stated to us that he gave no information to the broadcasting station that it did not already possess.

PROOF OF SERVICE

I, Calvin H. Childress, Attorney for the Petitioner, hereby certify that copies of the foregoing Petition for Writ of Certiorari were served as follows:

(1) on the United States by mailing copies thereof in a duly addressed envelope, with first class postage prepaid to C. V. Spratley, Jr., United States Attorney for the Eastern District of Virginia, and Roger T. Williams, Assistant United States Attorney for the Eastern District of Virginia, Federal Building, Norfolk, Virginia.

(2) by mailing copies thereof in a duly addressed envelope, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

Calvin H. Childress

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JUL 24 1962
JOHN F. DAVIS, CLERK

No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1962

VERNON KIRKPATRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
Assistants to the Solicitor General,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 221

VIRGINIA MILANOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20–27), as amended by the order of that court, dated June 4, 1962 (Pet. App. 18–19), is not yet reported. The original opinion of the court of appeals appears at Pet. App. 10–17. The opinion of the trial court (Pet. App. 1–9) dated March 10, 1962, denying a motion for a new trial is not reported.[1]

[1] The designation "R." refers to the 6-volume record on the merits, in No. 8493, United States Court of Appeals for the Fourth Circuit; "N.T.R." refers to the 5-volume record with respect to a new trial, in No. 8613 in the same court; "App." and "II App." (as distinguished from reference to the appendix to the petition as "Pet. App.") refer to the printed ap-

JURISDICTION

The judgments of the court of appeals with respect to the appeals in Nos. 8493 and 8613 were entered on April 30, 1962 (6 R. 14; 5 N.T.R. 10). On May 24, 1962, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including June 30, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner consented to the search of the house occupied by her and her husband and whether, in any event, the search was a lawful incident of the arrest of the husband and another man in the house.

2. Whether a motion for a new trial based on incidents having to do with pre-trial publicity was properly denied.

RULES INVOLVED

Federal Rules of Criminal Procedure:

RULE 33. NEW TRIAL.

* * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5

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pendices to appellant's brief and appellee's brief, respectively, these appendices appearing in this Court in a separate volume titled "Transcript of Record." As to these appendices, our references are to the original printed pagination, rather than to the pagination stamped on a portion of the appendices.

days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

RULE 41. SEARCH AND SEIZURE.

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.*

* * * The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner, her husband, and others were tried in December 1958, in the United States District Court for the Eastern District of Virginia on an indictment charging larceny and receiving goods stolen from a safe at a United States Navy base. Petitioner's conviction was set aside in this Court because of failure of the trial court to restrict the jury's verdict to only one of the two offenses. *Milanovich* v. *United States*, 365 U.S. 551. The conviction of Mike Milanovich on a single count was affirmed, and two of the others involved in the theft pleaded guilty (4 R. 242–243; 333–334). Petitioner was therefore retried alone. She was found guilty of larceny and sentenced to imprisonment for ten years.

1. *The motion to suppress:*

On the second day of the trial, petitioner moved to exclude evidence which had been taken at the time of her husband's arrest and which had been received

without objection at the first trial. The trial court, adverting to the fact that no motion to suppress had been made before either trial, although the date of retrial had been fixed many weeks before (App. 5–6), nonetheless proceeded to hear evidence on the issue out of the presence of the jury.

The evidence showed that on the morning of June 19, 1958, agents of the Federal Bureau of Investigation, pursuant to a warrant for the arrest of Mike Milanovich, went to the house in Norfolk, Virginia, occupied by the Milanoviches and arrested Mike Milanovich and one Clayton Grimmer, who was also there. One of the agents "talked to Mike and his wife [petitioner]" and asked "them" for permission to search the house (App. 1–2, 7, 20, 22).[2] Mike Milanovich, in petitioner's presence, signed a written form consenting to the search (App. 2–3, 25).[3] Petitioner made no objection and "was very cooperative. They were both cooperative" (App. 2). Thereupon, the agents searched the house. Two other persons, Clayton Grimmer and Millie Gauger, were also in the house (App. 5, 6, 10). In the bedroom occupied by Millie Gauger, the agents found a suitcase containing two pistols and silver coins, some of the coins still in the bank wrappers (App. 12, 26–27, 33, 37). An overnight or week-end bag was found in a closet off

[2] We believe petitioner to be in error in stating (Pet. 14) that "no evidence was offered suggesting that the accused was asked to consent to the search of her home or personal belongings."

[3] Petitioner had claimed that she was not present in the room at the time Mike Milanovich signed the consent to search (App. 4).

the dining room, containing silver coins (also in part in the bank wrappers) and a smaller zipper handbag (App. 27, 30, 33–34, 39). When agents asked petitioner about the overnight bag she denied possession thereof, stating that she had loaned the bag the night before to Millie Gauger, and that the suitcase was Grimmer's (App. 16, 28, 30). The district court ruled that petitioner had shown no excuse for late filing of the motion to suppress, and that, in any event, "the search of the premises was in all respects legal" and the evidence admissible (App. 23–24). The Court of Appeals affirmed, holding that there was no explanation for the failure to comply with Rule 41(e) and also indicating its agreement with the district court's alternative ground of decision (Pet. App. 22–24).

2. *The motion for a new trial.*

On September 18, 1961, a week prior to the commencement of the instant trial, a Special Assistant to the Attorney General, who was also a practicing attorney in Richmond, Virginia, was at the office of one Louis H. Peterson, owner of a Norfolk radio station and a client of the attorney. During the course of conversation, Peterson asked the attorney what had brought him to Norfolk, and the attorney replied that he was on the case involving petitioner. Thereupon Peterson asked him to give the station's news editor, Wynn Moore, an item on the case for broadcast. The attorney stated that he could "give no more than factual information that was common knowledge" (4 N.T.R. 4–6).

On the evening of September 18, 19[illegible], Moore referred to the case in four broadcasts, the text of which was shown to be as follows (1 N.T.R. Affidavit of Moore, December 27, 1961, Exhibits 1 and 2; 1 N.T.R., Order, March 10, 1962, pp. 2–3; 4 N.T.R. 16–179):

> A woman with a long record of arrests on charges of prostitution and liquor sales comes to trial Monday in Federal Court to face robbery charges for the second time. Virginia Milanovich, alias Caufman, alias Russo and several others, will be retried on charges of burglary and receiving stolen goods from the Commissary at the Little Creek Amphibious Base in 1958. The first trial found her guilty of both charges but the Supreme Court reversed the decision saying that the jury should have been instructed to bring in a verdict of guilty on only one of the charges. The case has been made more difficult by the murder of one of the witnesses. Chris Sofocleous, one of the thieves, turned states evidence and was later killed when his car was bombed in the prescribed gangland style. WNOR News has learned that the prosecutor, Joseph Bambacus, Special Assistant to Robert Kennedy, will attempt to have the transcript of the Sofocleous testimony entered and word has it that the evidence will be accepted. We tried to get confirmation of this from Mr. Bambacus with this result . . .

On September 21, 1961, four days prior to commencement of the instant trial, petitioner filed a civil action in Norfolk because of the broadcasts (1 N.T.R.

Exhibit 1 to Government Memo in Opp.; 4 N.T.R. 25–26).[4]

On the first day of the instant trial, September 25, 1961, the court questioned the jurors in detail as to any knowledge of the case (3 N.T.R. 1–H–Z; AA–BB) and, specifically, as to "any broadcasts on the radio" (3 N.T.R. 1–I). None of the jurors had heard the broadcasts. The judge excused four jurors who had read of the case in newspapers (3 N.T.R. 1–J, M–N, P, Z–AA). Petitioner exercised only two of her peremptory challenges (3 N.T.R. 1–Y), and agreed that the jury was acceptable (3 N.T.R. 1–BB).[5] Thereafter, the trial judge, in chambers, discussed with counsel and petitioner "some publicity in advance of this trial", and referred to "a newspaper account, which indicates it was published in some paper on September 22, 1961, and it has the headlines 'Suspect Sues for Libel' ". The judge requested the views of counsel and petitioner as to (1) whether the jury should be locked up during the trial, and (2) any additional suggestion defense counsel "or defendant" might have (3 N.T.R. 1–UU). Petitioner and her counsel, while making detailed suggestions on other matters, *e.g.*, segregation of witnesses (3 N.T.R. 1–UU–AAA), recommended that the jury not be locked up (3 N.T.R. 1–VV), and made no suggestion of any further precautions with respect to the prior broadcasts or libel action.

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[4] Petitioner took a nonsuit in the case on January 15, 1962 (4 N.T.R. 26).

[5] Alternate jurors were excused at the end of the trial without serving (1 R. 46).

No motion was made for adjournment, change of venue or a new trial by reason of the broadcasts, before trial or within the 5-day period subsequent to the verdict on September 29, 1961. The instant motion was filed on December 22, 1961, based on a claim that petitioner had just learned that the government prosecutor was the source of the information. In the hearing on the motion, on February 9, 1962, petitioner relied solely upon the *ex parte* deposition and affidavit of Moore, which recited the conversation with the government attorney as the source of the information for the broadcasts (1 N.T.R., Deposition, Nov. 30, 1961, Affidavit, Dec. 27, 1961; 4 N.T.R. 2). The government presented the testimony of the owner of the radio station and the original court record in the civil libel action (4 N.T.R. 4 *ff.*).[6]

The trial court ruled that the motion, if considered with respect to the substantive issue of guilt, was out of time, since petitioner's knowledge of the broadcasts was not a fact newly discovered after the trial, and petitioner made no showing that the government attorney's supplying of information could not have been discovered before or during trial by diligence on petitioner's part. The court reviewed the extensive questioning of the jury on *voir dire* and the requests made by the court that petitioner and her counsel suggest any additional steps in assuring the jury's proper

[6] The government attorney was unable to appear because of illness (4 N.T.R. 28).

functioning, and concluded (4 N.T.R. Opinion, March 10, 1962, p. 8; Pet. App. 8–9):

> [N]o member of the jury even knew that the broadcasts had been made, and * * * the broadcasts in no way affected the purity of the trial. The defendant has not even attempted to make a contrary showing.

The court of appeals affirmed the denial of a new trial. While criticizing the supplying of information to a radio station by a prosecutor, the court found that petitioner "has had her day in court before a jury whose fairness she herself does not impugn" (5 N.T.R. 2–14; Pet. App. 24–28).

Petitioner alleges (Pet. 11) that the court of appeals, subsequent to the filing of its original opinion on April 30, 1962, permitted the government attorney to appear before it with respect to language critical of him in the opinion. Upon his appearance before the court in chambers, counsel for petitioner was present, as also the owner of the radio station, counsel for the government, and counsel for the attorney who had been criticized. Thereafter, by order of June 4, 1962, the court of appeals amended its prior opinion by eliminating a reference to whether the supplying of information for the broadcast called for disciplinary action by the district court, and by adding a reference to the government attorney's statement to the court of appeals that he had given no information to the radio station that it did not already possess (5 N.T.R. 13–14; Pet. App. 18–19).

ARGUMENT

1. The motion to suppress the evidence of stolen currency found in the home of petitioner and her husband was properly denied by the trial court. As both courts below pointed out, the motion could properly have been denied because it was not timely filed under Rule 41(e), F.R. Crim. P. The only excuse offered for failing to move before the second trial was change of counsel, but new counsel had had a week before the second trial in which to raise the issue.

In any event, there was no illegality in the search. The record is undisputed that the search of the Milanovich home was made after the officers had talked to Mike Milanovich "and" petitioner and had asked "them" whether the officers could search the house (*supra*, p. 4), and after Mike Milanovich had signed a written consent-to-search form without objection on petitioner's part.[8] As observed by the court below, petitioner's acquiescence apparently was "part of a deliberate design on her part to cast full responsibility.

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[7] *Segurola* v. *United States*, 275 U.S. 106, 110–112; *United States* v. *Volkell*, 251 F. 2d 333, 336 (C.A. 2), certiorari denied, 356 U.S. 962; *United States* v. *Romero*, 249 F. 2d 371, 374 (C.A. 2); *United States* v. *Sheba Bracelets, Inc.*, 248 F. 2d 134, 142–143 (C.A. 2), certiorari denied, 355 U.S. 904; *United States* v. *Chieppa*, 241 F. 2d 635, 637–638 (C.A. 2), certiorari denied, *sub nom. Iricola* v. *United States*, 353 U.S. 973.

[8] There is authority holding that, even if petitioner had been absent, a search based on consent of her husband would have been valid. (See *Stein* v. *United States*, 166 F. 2d 851, 855 (C.A. 9), certiorari denied, 334 U.S. 844; *United States* v. *Sferas*, 210 F. 2d 69, 74–75 (C.A. 7), certiorari denied, *sub nom. Skally et al.* v. *United States*, 347 U.S. 935; and cases collected in 21 A.L.R. 2d 1078–1102).

for the presence of the stolen money upon either her husband or the house guest" (Pet. App. 24).

The search, moreover, was a lawful incident of the arrest of Mike Milanovich and Grimmer. Petitioner argues that the overnight bag was obviously a woman's piece of luggage—"obviously personal property and effects of the wife" (Pet. 14–15)—and therefore outside the scope of a search incidental to these arrests. But the two pistols and the loot found in a suitcase in the room occupied the night before by Millie Gauger confirm the reasonableness of the officers' assumption that luggage in the rooms might contain contraband. See *Carlo* v. *United States*, 286 F. 2d 841, 847–848 (C.A. 2), certiorari denied, 366 U.S. 944; *James* v. *United States*, 191 F. 2d 472, 473–474 (C.A. D.C.), certiorari denied, 342 U.S. 948. There was clearly a "plausible connection or relation" between the wife's overnight bag and the theft of quantities of silver (requiring bags) for which Mike Milanovich and Grimmer had been arrested. See *United States* v. *Moore*, 107 F. Supp. 393, 394 (S.D. N.Y.).

2. Petitioner takes no issue with the trial court's finding, made upon the basis of the trial court's in-

[9] Petitioner is incorrect in stating (Pet. 13) that the court of appeals did not consider the legality of the search as well as the question of timeliness of objection. The court of appeals, in distinguishing *Amos* v. *United States*, 255 U.S. 313, noted the violation of Fourth Amendment rights there, and characterized the instant facts, by contrast, as "far from clear", in showing a violation, the court adverting, *inter alia*, to petitioner's acquiescence in the search as part of a design to attribute possession of the stolen money to others (Pet. App. 24).

tensive *voir dire* examination, that none of the jurors had heard the radio newscast on the evening of September 18, 1961 (*supra*, pp. 7–9). Indeed, petitioner and her counsel evinced their complete confidence in the impartiality of the jury, finding it unnecessary to accept the court's suggestion for segregation of the jury during the trial. It was not until several months after sentence that petitioner claimed that misconduct of the government attorney, which had no effect on the trial, should vitiate the entire proceeding. In view of the fact that petitioner's trial was not at all affected by adverse publicity, there is no reason to reverse the conviction. Where it is shown that jurors have seen unfavorable publicity and the court must therefore judge whether a fair trial is possible, the courts have tended more readily to find the possibility of prejudice when the publicity is the result of a prosecutor's action. In *Henslee* v. *United States*, 246 F. 2d 190 (C.A. 5),[10] the court applied this doctrine to publicity occurring during the trial as the result of a prosecutor's action, even though no juror affirmatively admitted reading the articles in question. As to publicity occurring during trial, there could conceivably be some reluctance on the part of a juror, who has been told not to read newspapers or listen to broadcasts, to admit disobedience of the order, particularly where,

[10] The denial of certiorari in 359 U.S. 984 was not with respect to this decision but sustained a later trial (262 F. 2d 750), in which Henslee was found guilty.

as in *Henslee*, the question is merely addressed to the jury at large. Here, on the *voir dire*, each juror was questioned individually as to a broadcast which took place before trial. There is no basis whatever for supposing that the jurors would hesitate to answer truthfully the question whether they had heard it.

The action of the court of appeals in modifying its criticism of the government attorney involved is not a matter which concerns petitioner since the ruling as to petitioner remains the same—that reversal was not required, regardless of how the broadcast originated, because the impartiality of the jury was not affected. In view of the fact that the attorney involved had been ill at the time of the motion for a new trial, and therefore had not had an opportunity to testify, the court of appeals, which had severely criticized him and had suggested the possibility of disciplinary action, heard his side of the story in the presence of petitioner's counsel and counsel for the government. It thereafter modified the portion of its opinion which had suggested that disciplinary action might be appropriate. See Pet. App. 18–19. Petitioner's argument that the court of appeals took "unsworn testimony without the presence of the accused" (Pet. 12) ignores the fact that the hearing in chambers was addressed to a matter entirely discrete from the merits of petitioner's case (of which the court had already disposed)—that is, whether there was any occasion to suggest possible disciplinary action against an attorney.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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